Omni Innovations LLC et al v. Inviva Inc et al Doc. 16

THE HON. JOHN C. COUGHENOUR

HEARING: MAY 4,2007

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON, SEATTLE

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| **OMNI INNOVATIONS, LLC, a Washington Limited Liability company; JAMES S. GORDON, JR., a married individual,**<br><br>**Plaintiffs,**<br>v.<br><br>**INVIVA, INC., a Kentucky and Delaware corporation, d/b/a American Life Direct, and American Life Insurance Co. of New York; and JOHN DOES, I-X,**<br><br>**Defendants,** | **NO.** CV-06-1537-JCC<br><br>**PLAINTIFFS' RESPONSE TO MOTION TO STAY LITIGATION**<br><br>HEARING: MAY 4, 2007 (W/O ORAL ARGUMENT) |

Plaintiffs, by and through undersigned counsel, hereby respond to Defendant's Motion To Stay Litigation.

1. **The Resolution Of The Summary Judgment Motions In The *Virtumundo* Case Will Not End The Controversy In Either Case.**

Defendant is requesting that this case be stayed pending this Court's rulings on cross-

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motions for summary judgment in another case *Gordon v. Virtumundo,* Case No. CV06-0204JCC (hereafter *Virtumundo*). The rationale put forth in support of Defendant's Motion is that resolution of the issues raised in *Virtumundo* will have a dispositive effect upon this case. However, that is only true if the Court rules in favor of Gordon. In contradistinction, if the Court rules in favor of the defendants on both of the two issues raised by the cross motions for summary judgment in *Virtumundo*, Gordon will still have claims pending in both cases that would not be precluded by such a ruling, and both the *Virtumundo* case and the present case will continue.

**The Issues Before The Court In Virtumudo Are Only Dispositive If Gordon Wins.**

Defendants contend that this case should be stayed because the cross-motions for summary judgment in *Gordon v. Virtumundo,* Case No. CV06-0204JCC will determine whether Gordon is an "internet access service" (IAS) (and therefore has standing to bring a portion of the action) and whether the defendants' failure to accurately identify themselves in the "From" line of their commercial emails constitutes a violation of Can-Spam (15 USC 7701 et seq.), and/or the Washington State CEMA (RCW 19.190.020) (collectively "the statutes"). Since the email sent by the defendants in the present case also failed to accurately identify themselves in the "From" line of their commercial emails, a ruling that this failure is a violation of the statutes, coupled with a ruling that Gordon is an IAS, would prove dispositive to both cases. However, even a ruling that the *Virtumundo* defendants' failure to accurately identify themselves in the "From" line of their commercial emails AND a ruling that Gordon is not an IAS would not end either case. Gordon has made claims under the statutes in both cases that do not depend on the defendants failure to accurately identify themselves in the "From" line of their commercial emails, and/or whether Gordon is an IAS.

**Gordon's Standing**

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In *Virtumundo* , the undisputed evidence before the Court is that Gordon leases a dedicated server connected to the internet, and that Gordon uses that server to make information and email on that server available to the public. Further, Gordon hosts the domains and email for multiple third party customers' of Gordon's Internet Access Service. These customers in turn also make their own information available to the general public who can access those customers' domains on Gordon's server. These undisputed facts are present in both Gordon's sworn testimony, and the sworn testimony of Gordon's customers.

While the defendants have introduced nothing that would contradict these facts, the defendants in *Virtumundo* have attempted to strike the testimony of Gordon's third party customers. However, the *Virtumundo* defendants have not made any similar move with respect to Gordon's sworn statements. Therefore, regardless of how the Court rules on the defendant's motion to strike the sworn statements of Gordon's customers, the fact that Gordon leases a dedicated server connected to the internet, and that Gordon uses that server to host the domains and email for third party customers' of Gordon's Internet Access Service, and that Gordon makes all that information available over the internet has now indisputably been established in *Virtumundo*.

Depending on how the Court interprets the statutes, these facts will either establish that Gordon is an IAS, or will make it essentially impossible for any entity to establish itself as an IAS. However, even if this Court were to rule that there isn't a single entity in the entire universe that could be considered and IAS, Gordon would still have claims against both the *Virtumundo* defendants and the defendants in the present case.

In both cases Gordon has brought claims as the "recipient" of the emails in question under RCW 19.190.020. RCW 19.190.020 allows suits by the "recipient" of offending emails, and has no requirement that the "recipient" of the emails be an IAS to bring those claims. Accordingly, even if the Court holds that Gordon lacks standing to bring claims as an IAS,

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Gordon will still have standing to bring claims as a "recipient" in both cases, and both cases will continue until claims brought by Gordon as a "recipient" are resolved.

**The Defendants In Both Cases Failed To Accurately Identify Themselves In The "From" Line Of Their Commercial Emails**

One of Gordon's theories is that the defendants' failure in both the present case and in the *Virtumundo* case to accurately identify themselves in the "From" line of their commercial emails is a violation of the statutes. However, this is only one of several theories Gordon has brought. Accordingly, while a ruling by the Court in Gordon's favor on this theory will prove dispositive in both cases, a ruling in *Virtumundo*'s favor will not.

As set forth in Gordon's briefing in the *Virtumundo* case, the premise that it is a violation of the statutes for the defendants' to fail to accurately identify themselves in the "From" line of their commercial emails is well supported by case law, the statutory language, and the legislative history. Indeed, the FTC's interpretation of the term "from" line in the CAN SPAM Act completely supports Gordon's motion in *Virtumundo*. As the *Virtumundo* defendants themselves have noted, the Federal Trade Commission (FTC) has the primary obligation for enforcing the CAN SPAM Act, (the Act) on behalf of the federal government. In pertinent part, the FTC's interpretation states:

> Several commenters requested guidance on CAN–SPAM's regulation of ''from'' line content… Because a significant number of commenters sought guidance on this issue, the Commission believes it helpful to set forth its interpretation of this portion of the Act…
>
> [I]f the ''from''line accurately identifies the person who initiated the message, then the ''from'' line would not be deceptive. The Commission believes that this does not mean that the ''from'' line necessarily must contain the initiator's formal or full legal name, but it does mean that it must give the recipient enough information to know who is sending the message. For example, if John Doe, marketing director for XYZ Company, sent out commercial e-mails for the company and the ''from'' line indicated that the message was from ''John Doe'' or from ''XYZ Company,'' the ''from'' line would have accurately

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> identified the person who initiated the message. Whether any other name—such as the user ID, corporate division, e-mail service provider, or others suggested by commenters —would be legally sufficient depends on whether such name ''accurately identifies'' a person who ''initiated'' the message, as that term is defined by the Act. For additional guidance on what information in the ''from'' line is acceptable, e-mail senders should consider their messages from their recipients' perspective. If a reasonable recipient would be confused by the ''from'' line identifier, or if a reasonable recipient would not expect the ''from'' line identifier that is provided, those are indications that the sender is not providing sufficient information. 70 Fed. Reg. 25426, 25431-32 (May 12, 2005) (emphasis added)

The FTC thus agrees with Gordon that the name used in the "from" line is supposed to give enough information so that the recipient will know who sent the message. A plain reading of the "from" lines at issue in both the present case and in the *Virtumundo* case demonstrates that the defendants in both instances have failed to give any information that would allow a recipient to identify the name of the sender of the emails at issue. However, even if the Court ignores the case law, the statutory language, the legislative history, and the FTC's interpretation of the term "from" line in the CAN SPAM Act, there will still be unresolved issues in both cases.

The defendants' fraudulent "from" lines are only one of the technical violations that Gordon has alleged under the statutes. Gordon has also alleged other violations that would exist even if the Court ignored the FTC guidance and ruled that the fraudulent "from" lines were not a violation. For example, Gordon has alleged that the emails in question used misleading subject lines to induce recipients to open those emails. The use of misleading subject lines violates both CAN SPAM and CEMA. Further, in both cases, Gordon contends that Gordon repeatedly requested that the defendants stop sending Gordon commercial email at issue. For the defendants to continue to send Gordon commercial email after Gordon made that request is a violation of CAN SPAM *even if the commercial email comports with the CAN SPAM ACT in all other respects.* Thus, even if the Defendants' in *Virtumundo* are somehow able to convince the Court that it was not a violation of the statute for them to use a "from" line that gives no information that would allow the recipient to know who sent the message, the question of

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whether the other portions of the emails at issue violated the statutes will remain unresolved.

**2. Despite The Fact That The Resolution Of The Summary Judgment Motions In The Virtumundo Case Will Not End The Controversy In Either Case, The Plaintiffs Are Not Opposed To A Short Stay.**

As demonstrated above, while a ruling in favor of the *Virtumundo* defendants would still leave unresolved the question of whether the other portions of the emails at issue in Gordon's various cases violate the statutes, a ruling in favor of Gordon would effectively end all of these cases, since a single violation is sufficient to establish the defendants' liability. Gordon recognizes that the Court has many serious matters before it, and the Court must prioritize its workload. Accordingly, Gordon does not object to a short stay in this case to allow the Court to rule on the pending motions in *Virtumundo*. However, in light of the fact that numerous issues will remain unresolved regardless of how the Court rules, Gordon respectfully requests that the Court not issue a stay if the Court does not foresee making a ruling on the pending motions in *Virtumundo* in the immediate future.

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RESPECTFULLY SUBMITTED this 30th day of April, 2007.

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## Certificate of Service

I, hereby, certify that on April 30, 2007, I filed the attached pleading with this Court via approved electronic filing, and served the following:
Attorneys for Defendants: Derek Newman, Roger Townsend, Newman & Newman.

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